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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DEBBEE NAHABEDIAN,

Plaintiff and Appellant,

v.

ROBERT SMITH, et al.,

Defendants and Respondents.

G055815

(Super. Ct. No. 30-2015-00793472)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Glenn R. Salter, Judge. Affirmed.

Keiter Appellate Law and Mitchell Keiter for Plaintiff and Appellant.

Tyson & Mendes, Jacob R. Felderman and Leslie M. Price, Jr., for
Defendants and Respondents.

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Plaintiff Debbie Nahabedian suffered serious injuries after falling – or jumping or being pushed – from the fourth story balcony of an apartment immediately adjacent to her own apartment. Nahabedian’s resulting brain injury left her with no memory of the late-night incident and there are no witnesses. Consequently, how Nahabedian came to land below that balcony formed the basis of a summary judgment motion resulting in this appeal.

Nahabedian sued Robert Smith, the building owner, for premises liability and negligence per se. Nahabedian alleged the balcony guardrail was six inches shorter than the building code allowed, creating a dangerous condition that caused her injury because the railing lacked “sufficient height to prevent an individual from falling over [it].”

Smith moved for summary judgment, contending Nahabedian lacked evidence showing a triable issue of fact exists on the issue of causation. Smith asserted that without any evidence of how or why Nahabedian went over the fourth floor balcony railing, Nahabedian only could speculate she fell accidentally. Smith argued there are multiple, equally plausible alternate theories of causation, all involving intentional acts that would not be thwarted by a six-inch higher railing. Consequently, Smith contended, Nahabedian “could not prove her injury was caused by the code-deficient height of the railing.”

The trial court agreed and granted summary judgment for Smith. We affirm.

I

BACKGROUND

A. *The Incident*

Just before midnight on May 19, 2015, Nahabedian spoke on the phone with her daughter and agreed to babysit her grandchild the following morning. About an

hour later, Nahabedian's next door neighbor, Maciej Lisiak, woke up at the sound of his dog barking. Nahabedian and Lisiak lived in the same building in adjacent fourth-floor apartments. Each apartment had its own outside balcony that neighbors could enter through an unlocked gate. Lisiak thought he heard someone open the gate to his balcony and then try to open the door to his apartment, so he got up to investigate.

Lisiak saw Nahabedian standing on his balcony, turning the knob to his door. Lisiak observed that Nahabedian "seemed to be talking to herself and walking along the balcony. And then she approached the sliding door." Lisiak watched Nahabedian try to open his slider, noting "[s]he was really focused" and her "face was down." When she finally looked up, he thought it "almost seemed like she didn't recognize me." Through the closed door, he waved his arms at her and told her, "'Debbee, what are you doing? It's the middle of the night. Go home. What the heck?'"

Nahabedian "didn't quite respond except she turned around and started leaving." Lisiak watched her disappear "behind the corner behind the door." Though he did not hear the gate, he assumed "she just went home," and he went back to sleep.

A short time later, Lisiak heard a loud noise outside, went out on his balcony and, peering over the railing, saw Nahabedian lying on the driveway below his balcony. According to a Sheriff's Department report, Nahabedian was lying next to a vehicle with a smashed windshield, its indentation the size of a human head. Nahabedian's eyes were open and the deputy on the scene asked her to show one finger if she jumped off the balcony and two fingers if someone pushed her. She moved all four fingers.

As paramedics took Nahabedian to the hospital, deputies interviewed potential witnesses, none of whom had seen how Nahabedian ended up on the driveway below Lisiak's balcony. A deputy observed a plant on Lisiak's balcony was knocked over on its side, but Lisiak did not know whether the plant had been like that earlier in the

day. Deputies entered Nahabedian's apartment and found no sign of a struggle and no suicide note.

Nahabedian has no recollection of the 30 minutes before the incident. She has no recollection of how the incident occurred. Nahabedian's first memory is ten days after the incident.

B. History of Drug Abuse, Mental Illness, and Sleepwalking

At the time of the incident, Nahabedian had a long history of mental illness and recreational drug use. On a previous occasion she had been hospitalized for psychiatric issues and was diagnosed with multiple psychiatric disorders including depression, alcoholism, and atypical bipolar disorder, among others. She had been taking antidepressive medication for 25 years, and was prescribed Ambien at the time of the incident. In a toxicology screen performed immediately after the incident, Nahabedian tested positive for cocaine and alcohol.

Nahabedian also had a recent history of sleepwalking. About a month before the incident, Nahabedian asked a surprised Lisiak if he had seen her sleepwalking; she expressed to him her concern that "she thinks she's been going places, not being aware that she's going there." She blamed her medications and told Lisiak that in one sleepwalking incident "she drove her car somewhere[.]" Asked in her deposition about sleepwalking before the incident, Nahabedian described learning she had "slept-walk" one night from the following clues: "When I woke up in the morning, my keys were in the door. There was a receipt on the counter with change" from a nearby 7-Eleven store. She had no memory of "putting the key in the door or having left change on the counter[.]"

C. The Operative Complaint

Nahabedian sued Smith, the owner of the apartment building, for premises liability and negligence per se. In her premises liability claim, Nahabedian alleged the guardrails on the balconies were "unreasonably low" and "not of sufficient height to

prevent an individual from falling over them.” Nahabedian alleged the insufficient height of the railing caused her injuries because she “fell against the guardrail and due to its inadequate height, her fall was not broken[;] instead she fell from the fourth story balcony. . . .”

In her negligence per se claim, Nahabedian alleged applicable building codes require guardrails to be at least 42 inches in height, but the balcony guardrails were between 35 and 36 inches in height. She alleged the below-code guardrails “did not offer adequate protection against a fall” because “[g]uardrails, to be effective, must have a height which is equal to or above the center of gravity of the individual it is designed to protect.” She further alleged that a “properly installed guardrail of the required height of forty-two (42) inches . . . would have . . . prevented [Nahabedian] from falling from the balcony.”

D. *Trial Court Proceedings*

Smith moved for summary judgment on the ground Nahabedian “does not possess, and cannot reasonably obtain evidence necessary to establish the element of causation” for either cause of action. Essentially, Smith argued that because Nahabedian has no memory of or witnesses to how she went over the balcony railing, she cannot prove the insufficient height of the railing “played any role” in causing her injuries. While Nahabedian alleged she *fell* over the dangerously low railing, Smith argued “[i]t is also possible that she jumped from or climbed over the railing.”¹

Nahabedian’s opposing papers disputed Smith’s assertion she could not prove causation. Nahabedian argued there was “considerable circumstantial evidence

¹ Smith’s accompanying Separate Statement of Undisputed Material Facts listed just four undisputed facts: (1) Nahabedian has no recollection of 30 minutes before the incident; (2) she has no recollection of how the incident occurred; (3) there are no independent witnesses to the incident; and (4) Nahabedian’s first memory is 10 days after the incident. Smith’s evidentiary support consisted of excerpts from Nahabedian’s deposition testimony and written discovery responses.

that [she] did indeed fall off the balcony,” pointing to evidence of her “history of sleepwalking,” her apparent confusion in trying to enter a neighbor’s apartment, and the overturned plant on the balcony, “suggesting [she] may have tripped over the pot” Nahabedian further argued Smith’s “alternative explanations for the incident . . . are contradicted by the facts.” She asserted her telephone conversation with her daughter an hour or so before the incident, in which she agreed to babysit her grandson the next day, defeated the “speculation” she had jumped off the balcony in a suicide attempt. Also, she asserted there was no evidence she was pushed off the balcony because “[l]aw enforcement has also ruled out foul play[.]”

The trial court granted Smith’s motion for summary judgment, agreeing with Smith’s contention there was no evidence of causation or a legal basis for shifting the burden of proof on that issue to him. The court also sustained Smith’s objections to the reports and declaration of plaintiff’s expert, Brad Avrit. The excluded evidence primarily concerned the pertinent building code standards, the height of the guardrail, Avrit’s calculation of Nahabedian’s center of gravity, and his opinion the railing’s height, just below her center of gravity, was insufficient to stop her fall and, therefore caused her injuries.

II

DISCUSSION

A. *Standard of Review*

“On appeal after a motion for summary judgment has been granted, we review the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained. [Citation.] Under California’s traditional rules, we determine with respect to each cause of action whether the defendant seeking summary judgment has conclusively negated a necessary element of the plaintiff’s case, or has demonstrated that under no hypothesis is

there a material issue of fact that requires the process of trial, such that the defendant is entitled to judgment as a matter of law.” (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.)

“[A] defendant meets its burden of showing that a cause of action has no merit ‘if that party has shown that one or more elements of the cause of action . . . cannot be established[.]’ Once the defendant meets the foregoing burden, ‘the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action . . . [and] set forth the specific facts showing that a triable issue of material fact exists as to that cause of action[.]’ (Code Civ. Proc., § 437c, subd. (o)(2).) . . . ‘Under the current version of the summary judgment statute, a moving defendant need not support his motion with affirmative evidence negating an essential element of the responding party’s case. Instead, the moving defendant may . . . point to *the absence of evidence to support the plaintiff’s case*. When that is done, the burden shifts to the plaintiff to present evidence showing there is a triable issue of material fact. If the plaintiff is unable to meet her burden of proof regarding an essential element of her case, all other facts are rendered immaterial. [Citations.]’ [Citation.]” (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 780-781 (*Saelzler*).)

B. *Smith Met His Initial Burden by Negating the Element of Causation*

To meet his initial burden, Smith presented evidence that Nahabedian had no recollection of the incident or how it occurred and there were no independent witnesses to the incident. This evidence satisfied Smith’s initial burden to negate the causation element of Nahabedian’s negligence and premises liability claims. The burden shifted to Nahabedian to establish a triable issue of material fact on the cause of her injuries.

C. *Nahabedian Failed to Establish a Triable Issue of Fact on Causation*

To defeat summary judgment, Nahabedian had to present *some* evidence the alleged dangerous condition (a too low guardrail) more likely than not played a role

in causing her injuries. (*Saelzler, supra*, 25 Cal.4th at p. 773 [plaintiff cannot prevail at summary judgment unless she shows defendant’s breach of duty bore a causal connection to her injury].) Like the trial court, we conclude she failed to make that showing.

Nahabedian’s problem in showing a triable issue of fact on causation is easily grasped. There was no direct evidence of how she ended up lying on the driveway below Lysiak’s balcony, and the circumstantial evidence fits multiple alternative scenarios. In only some of those scenarios is the insufficient height of the railing a substantial factor in causing her injuries.

According to Nahabedian, these alternative scenarios fall into two categories: There was either an *intentional* descent resulting from an attempted murder or suicide, or an *unintentional fall*. Nahabedian admits if the descent was intentional, the height of the railing was not a substantial factor in her injury. She concedes a higher, code-compliant gate would not have stopped someone intent on murder or suicide. On the other hand, Nahabedian argues, “if she went over unintentionally,” i.e., if she *fell* over the railing “due to clumsiness, fatigue, darkness, intoxication, a fallen plant, or sleepwalking,” then the height of the railing was a causative factor because “she would not have gone over if the guardrail had been six-plus inches higher, well above Nahabedian’s center of gravity.” Thus, Nahabedian contends, causation depends on whether her descent was intentional and unintentional.

On appeal, Nahabedian raises a new argument in an effort to tip the scale in favor of the latter alternative. She argues for the first time that a particular statute, Evidence Code section 520, shifts to Smith the burden of proof on this crucial issue. (All further statutory references are to the Evidence Code.) Code section 520 provides: “The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue.”

Nahabedian argues that by contending her descent could have been the result of attempted murder (crime) or suicide (a wrong), Smith triggered a shift of the

burden of proof under section 520. More to the point, Nahabedian concludes that, given the complete lack of evidence on the cause of her descent, Smith cannot satisfy his burden of proving either a criminal or wrongful descent; thus, the trial court was compelled to conclude her fall was unintentional.

Nahabedian also argued in her brief for the first time that yet another statute, section 521, also shifts to Smith the burden of proof regarding the manner of her descent. Section 521 provides: “The party claiming that a person did not exercise a requisite degree of care has the burden of proof on that issue.” She additionally argues that case law holds that “[p]arties who lose their memory due to an incident and cannot remember its details are thus deemed to have acted with due care unless and until proven otherwise. [Citation.]”

Nahabedian did not raise these burden of proof arguments below. The closest she came was her citation to case law regarding the presumption against suicide [“humans’ natural ‘love of life’ renders accidental means a presumptively more plausible account of a death than intentional suicide”], which she repeats in her appellate brief.

A bigger problem for Nahabedian in making these new burden of proof arguments is that they ignore a “third” alternative scenario which Smith characterizes in his brief as an “equally plausible” exculpatory theory. Smith argues the evidence also supports a theory of causation in which Nahabedian “intentionally bypasses the railing without intent to injure herself.” Smith offers a few possible examples of such a scenario: Nahabedian “was confused as to her whereabouts, she may have intentionally climbed over the railing, perhaps mistaking it for the gate to the balcony, or perhaps not even realizing it was the balcony railing around her neighbor’s balcony. In either scenario, she may have had no idea in doing so she was putting herself in danger. Her subsequent fall would have been unintentional despite the fact that she bypassed the railing intentionally. Under this scenario, there is no causal link between the rail height

and Appellant's injuries."^{2 3} Moreover, this third alternative scenario does not involve any accusation of attempted murder or suicide (crime or wrong), and thus would not trigger any shift of the burden of proof per the cited statutes.

We are thus back to the basic rules for determining whether Nahabedian carried her burden to show a triable issue of material fact exists on causation. To establish the element of actual causation, it must be shown that the defendant's act or omission was a substantial factor in bringing about the injury. (*Saelzler, supra*, 25 Cal.4th at p. 778.) "[T]he plaintiff must establish by nonspeculative evidence, some actual causal link between the plaintiff's injury and the defendant's failure to provide adequate [safety] measures. [Citations.]" (*Id.* at p. 774.)

Smith rightly argues that Nahabedian's overwhelming hurdle in proving causation is the fact there are multiple alternative causation scenarios, and none is more likely than the other. "Where there is evidence that the harm could have occurred even in the absence of the defendant's negligence, 'proof of causation cannot be based on mere speculation, conjecture and inferences drawn from other inferences to reach a conclusion unsupported by any real evidence. . . .' [Citation.] 'As Professors Prosser and Keeton observe, "A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, *it becomes the duty of the court to direct a verdict for the defendant.*"' [Citations.]" (*Padilla v. Rodas* (2008) 160 Cal.App.4th 742, 752 (*Padilla*); *Williams v.*

² Smith points out in his brief that this is not a new argument; he raised these possibilities in his reply papers below.

³ Nahabedian's only rejoinder to this "third scenario" is that the railing's deficient height was still a substantial factor because it is easier to climb a railing that is six inches shorter. While it is undeniable that it is easier to climb a 36 inch high railing than a 42 inch high railing, that fact alone does not make the height a substantial factor – it does not establish that she would not have climbed the railing if it was 42 inches high.

Wraxall (1995) 33 Cal.App.4th 120, 133 [defendant’s conduct did not cause the harm where evidence shows only ““a 50-50 possibility or a mere chance”” that the harm would have ensued”].)

The *Padilla* case is instructive on why Nahabedian cannot show a triable issue of fact on the issue of causation. Nahabedian acknowledges the significance of *Padilla* and *Johnson v. Prasad* (2014) 224 Cal.App.4th 74 (*Johnson*), both cases of child drowning where there were no witnesses or any direct evidence of how the child entered the pool area unattended. In both cases there was a dangerous condition on the premises – a door or gate leading to the pool area that did not self-close or self-latch, and the plaintiff sued the homeowner for premises liability, alleging the unsafe door or gate was a substantial factor in causing the drowning. In both cases, the trial court granted summary judgment for the defendant homeowner because the plaintiff failed to prove causation; only one of those decisions survived on appeal.

In *Padilla*, the appellate court affirmed summary judgment, finding the plaintiff failed to present any evidence the child entered through the unsafe gate – there were three possible entry points to the pool and it was purely speculative as to whether the child entered the pool area through the defective gate or through one of the other access points to the pool. Because “[t]he probabilities are evenly balanced” as to which entrance the child used, the appellate court held the plaintiff “cannot establish that [defendants’] failure to provide a self-latching gate was a substantial factor in causing [the child’s] drowning.” (*Padilla, supra*, 160 Cal.App.4th at pp. 752-753.)

In *Johnson, supra*, 224 Cal.App.4th 74, the appellate court reversed a summary judgment for the homeowner, finding plaintiff had created a triable issue on causation. In *Johnson*, there was only one door through which the child could have entered the pool area, and that door did not have a self-closing, self-latching mechanism. The court explained: “Unlike [in] *Padilla*, there was no dispute” that the child entered the pool area through a door that lacked a “self-closing, self-latching mechanism.” (*Id.* at

p. 84.) Because the unsafe door was the only entry point for the pool area, the appellate court held a sufficient basis existed to infer the dangerous condition of the door was a substantial factor in causing the child's drowning and therefore the issue should go to the jury. (*Ibid.*)

In the instant case, Nahabedian did not present facts showing it is more likely she accidentally fell from the balcony than that she descended as a result of an intentional act. Like the plaintiff in *Padilla*, Nahabedian confronts alternative causation scenarios, all of which are equally probable. Consequently, she cannot show a triable issue of fact exists on whether the height of the railing was a substantial factor in causing her injuries.

We note Nahabedian relies heavily, to no avail, on a wrongful death case from Louisiana, *Cay v. State, Department of Transportation and Development* (La. 1994) 631 So.2d 393 (*Cay*). Though *Cay* involves claims of premises liability based on somewhat analogous facts, we find it distinguishable.

Cay's body was found below a bridge designed solely for vehicular traffic. Though no witnesses saw what had happened to Cay, "broken brush above the body . . . indicated that Cay had fallen from the bridge." (*Cay, supra*, 631 So.2d at 394.) The bridge's guardrails were only 32 inches high – "the minimum height under existing standards for bridges designed for vehicular traffic," but below the height required for a pedestrian bridge. (*Cay, supra*, 631 So.2d at p. 394.) Cay's parents filed a wrongful death action against the state agency responsible for designing the bridge, alleging the guard railings "were too low and therefore unsafe for pedestrians whom the [state agency] knew were using the bridge" (*Id.* at p. 395.)

After a bench trial that included competing expert testimony on whether the inadequate height of the bridge's railings caused Cay's death, the trial court rendered judgment for plaintiffs. The court concluded Cay accidentally fell from the bridge and the

rail height “was a cause of the accident in that ‘a higher rail would have prevented the fall.’” (*Cay, supra*, 631 So.2d at p. 395.)

The Louisiana Supreme Court affirmed the judgment, according “great deference” to the trial court’s “cause-in-fact determination[.]” (*Cay, supra*, 631 So.2d at p. 398.) The high court noted that, while “[t]he circumstantial evidence did not establish the exact cause of Cay’s fall from the bridge,” it did support the trial court’s finding it is “most likely that [Cay] accidentally fell over the railing,” rather than that he jumped or was pushed. (*Id.* at p. 397.)⁴

The *Cay* case does not assist Nahabedian because, unlike the plaintiffs in *Cay*, she presented no evidence that an accidental fall over the railing was the most likely explanation for her injuries. As noted, evenly balanced probabilities fall short of the requisite standard. (*Salazar, supra*, 25 Cal.4th at pp. 775-776.) The trial court properly granted summary judgment.

D. *The Argument Concerning the Exclusion of the Expert Opinion Evidence Is Moot*

Nahabedian contends the trial court abused its discretion in excluding the reports and declaration of her expert, Brad Avrit. The excluded evidence concerned Avrit’s opinion that the height of the railing, below Nahabedian’s center of gravity, was insufficient to prevent her fall and, thus, a substantial factor in causing her injuries.

⁴ The opinion cited facts in support of an accidental fall such as Cay’s intoxication, his dark clothes, and that he “was walking on the wrong side of the road for pedestrian traffic,” perhaps causing him to become “startled by oncoming traffic[.]” (*Cay, supra*, 631 So.2d at pp. 394-395, fn. omitted.) The opinion also cited facts pointing away from suicide or murder. (*Id.* at p. 397.)

Because we have concluded as a matter of law that Nahabedian cannot prove she *fell* over the railing, evidence on *why* she fell is irrelevant. Consequently, the exclusion of this expert evidence is a moot point.

III

DISPOSITION

The judgment is affirmed. Smith is entitled to his costs on appeal.

ARONSON, J.

WE CONCUR:

O'LEARY, P. J.

BEDSWORTH, J.